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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

No. 73-2020

October Term, 1973

REGINALD LEWIS,

Petitioner,

-against-

HUDSON WATERWAYS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REGINALD LEWIS, Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Reginald Lewis prays for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Second Circuit entered on April 15, 1974, affirming both an order and a judgment of the District Court.

Opinions Below

No opinion was rendered by the District Court with respect to the order or judgment here concerned. The order here concerned, following the first trial, appears on pages 1a-3a* of the Appendix and was entered on the 9th day of March, 1972. The opinion of the Court of Appeals on the appeal taken after the second trial appears on pages 4a-8a of the Appendix, and has not yet been officially reported.

*References are to the appendix unless otherwise stated.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statutes Concerned

Title 46 USC 596

"The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel, the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts. R.S. §4529; Dec. 21, 1898, c.28, §§4, 26, 30 Stat. 756, 764; Mar. 4, 1915, c. 153, §3,38 Stat. 1164."

Title 46 USC 642

"Every master shall, not less than forty-eight hours before paying off or discharging any seaman deliver to him, or, if he is to be discharged before a Coast Guard official to whom the duties of shipping commissioner have been delegated, to such Coast Guard official, a full and true account of his wages, and all deductions to be made therefrom on any account whatsoever; and in default shall, for each offense be liable to a penalty of not more than $50. No deduction from the wages of any seaman except in respect of some matter happening after such delivery shall be allowed, unless it is included in the account delivered; and the master shall, during the voyage, enter the various matters in respect to which such deductions are made, with the amounts of the respective deductions as they occur, in the official log book, and shall, if required, produce such book at the time of the payment of wages, and, also, upon the hearing, before any competent authority, of any complaint or question relating to such payment." R.S. §4550; 1946 Reorg. Plan No. 3, §§101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097.

Questions Presented

1. May a trial judge for no reason appearing in the record set aside a jury verdict properly supported by the evidence after a trial in all respects properly conducted?

2. May a trial judge for no reason appearing in the record and without written application therefor by the other side set aside his own directed verdict?

3. Was plaintiff denied a fair trial on the issue of the

reasonableness of the withholding of his wages when the trial court permitted proof of two defenses, both outlawed by 28 U.S.C. 642?

Statement

Reginald Lewis was a merchant seaman aboard the U.S. Flag Transorleans, having joined the vessel on January 11, 1967 at Freeport in the Bahamas as an assistant engineer. He was injured on March 7, of 1967 and was discharged at Balboa Canal Zone, on April 15, 1967 for medical attention. The Master made up his pay voucher pursuant to the provisions of 46 U.S.C. 642, showing $3,965.69 to be due to Lewis, and also prepared a Standard Form of Mutual Release by the ship to the seaman, and the seaman to the ship. (13a)*

Because the Master claimed that he did not have the cash with which to pay Lewis, he endorsed the statements on the Mutual Release "Wages to be received in New York" and "No wages at this office", and the Shipping Commissioner required Lewis to sign his name opposite the statement. (13a)

The pay voucher contained the following certification:

> "I certify that this voucher is true and correct that the person named hereon was employed and has performed

*While the Court of Appeals claimed to find a rational basis for the subsequent jury verdict on the second trial in its statement that the second jury denied the liquidated damage because of the alleged "assignment" it is clear that on the first trial the jury found otherwise. Indeed, on the first trial it would appear that this was not the basis for the judge's action because he himself directed a verdict, whereas the alleged assignment would have forbidden such action. Furthermore, as appears later, this issue should never have been submitted to the jury on the Second trial.

the services for the period as stated and that he is entitled to the amount of pay as stated on this voucher.

P. Zambourous
Master" (12a)

Further, the Master was absolutely categorical in his testimony (by deposition) that he prepared both the Standard Release and the seaman's pay voucher himself, and that he discharged Lewis ashore with the intention and belief that Lewis would receive his wages from the Company in New York. His testimony was in part as follows:

Q. When you signed this paper, did you intend that he would get his money in New York?

A. It was the last minute when the ship's sailing, so I told him that I gave you the voucher, and you go to New York to collect it. That was the agreement with the Shipping Commissioner.

Q. That was your agreement and the agreement with the Shipping Commissioner?

A. Yes.

Q. So you sent him ashore knowing that he was going to agree to get his wages in New York?

A. Yes.

Q. You knew that when you sent him ashore?

A. Of course.

Q. That was the agreement, there is no doubt about it?

A. No.

Two days after his discharge on Monday, April 18, 1974, Lewis presented the voucher and the endorsed Mutual Release to the Paymaster in New York, who refused to honor it, pending instructions from the ship. Lewis requested payment again on April 19, and was refused and on April 20 was told that the ship had already paid his wages to the vessel's chief engineer. The chief engineer, who had in fact received the money, wired $3,000 of the $3,965.69 that was due, but retained $965.69. Lewis sued for $965.69 still unpaid and for two days' pay for each day that such wages were "unreasonably withheld" pursuant to the provisions of 46 U.S.C.A. 596. On the first trial, the defendant contended over objection by the plaintiff that it acted reasonably in making payment to Lewis because it claimed that he had not in fact worked the hours of overtime shown by the Master on the pay voucher and therefore had not in fact earned the $3,965.69 shown to be due on the wage voucher and certified by the Master thereon to be due.

The defendant also claimed that it had an "assignment" from Lewis directing the Master to pay the wages to the chief engineer upon presentation of the assignment and pay voucher.

There was proof by the plaintiff that both the overtime records on which the first contention depended and the alleged "assignment" were in fact forged: the jury necessarily found when answering interrogatories addressed by the trial Judge (7a) that:

1. The assignment was invalid.

2. The wages were unreasonably withheld.

On written motion papers, the defendant moved to set aside ". . . the jury verdict with respect to the reasonableness of the withholding of the plaintiff's wages. . ." *Neither the notice of motion nor the supporting affidavit contained any reference to or request for relief with respect to the directed verdict of the Court for the wages themselves which had been granted by the Court.*

In the oral argument of the motion, without explanation or justification for its action, the Court set aside the jury verdict, holding the wages to have been unreasonably withheld and directed a new trial. (4a)

The Court having announced its decision with reference to the jury verdict, defense counsel then stated orally to the Court that if the Court left the directed verdict for the unpaid wages, as distinguished from the liquidated damages stand on the new trial defendant would have difficulty defending the reasonableness of the withholding. In response to such statement the Court stated that it would also set aside the directed verdict. (4a)

Since the decision of the Court was not a final decision, no appeal could be taken from the actions of the Court at that time until the second trial that thereafter resulted. An application for certification pursuant to 1292(b) was denied by the trial judge.

Jurisdiction for seamen to sue in the Federal Court for wages withheld is expressly granted by the statute quoted, 46 USC 596 without limitation as to the amount in controversy.

ARGUMENT

The First Trial

The law with respect to the circumstances under which the trial court may set aside a jury verdict has become the subject of considerable disarray in the various federal courts. Thus, Moore on Federal Practice (2nd Edition ¶5908[5]) states that a motion for a new trial on the ground that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. Also, that the grant or denial of the motion under the compulsion of a mistake of law is reviewable under unusual or special circumstances, and that the trial court's action may constitute an abuse of discretion and thus be reviewable.

In *Firemen's Fund Insurance Company v. Aalco Wrecking Company, Inc.*, 466 Fed.2d 179 decided August 7, 1972, the Court of Appeals for the Eighth Circuit, finding that the evidence was sufficient for the jury to pass upon, concluded that the trial court erred in granting a judgment notwithstanding the verdict in favor of the plaintiff and granting a new trial, and reversed the holding of the trial judge and reinstated the verdict.

In so doing that affirmed the authority of the case of *Lind v. Schenley*, 278 Fed.2d 79, wherein the Court of Appeals for the Third Circuit stated that where the trial court finds the verdict contrary to the weight of the evidence and grants a new trial that the Appellate Court should "exercise a longer degree of scrutiny and supervision in order to protect the litigant's right to a jury trial". In the *Lind* case, the Court of Appeals cited other cases from the Courts of Appeal of the Sixth and Fifth Circuits.

By contrast, in the instant case, the Court of Appeals for the Second Circuit, making practically no reference other than a footnote (7a) to the appeal from the First Trial did so on the authority of *Portman v. American Home Products Corp.*, 201 Fed. 2d 847. The *Portman* decision had held that (201 Fed.2d 848):

> "There may be errors that are not reviewable at all and among those that are not are erroneous orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence."

Despite the reference to *Portman*, as the basis for giving such short shrift to the plaintiff's appeal from the orders of the first trial hearing, it is to be noted that the Second Circuit had in other cases reversed such rulings by a trial court and reinstated a previous verdict. *Berner v. Pacific Airlines Limited*, (CA 2d 1965) 346 Fed.2d 532.)

In the *Lind* case, 278 Fed.2d 79 the Court of Appeals stated the rule as follows (278 Fed.2d 90):

> "New trials granted because (1) a jury verdict is against the weight of the evidence was readily distinguished from (2) new trials ordered for other reasons: for example evidence improperly admitted, prejudicial statements by counsel, an improper charge to the jury or newly discovered evidence. In the first instance—it is the jury which fails improperly to perform the functions confided to it by law. In the latter instance something occurred in the course of the trial which resulted or which may have resulted in the jury receiving a

distorted, incorrect or incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible. . . . Under these conditions there is no usurpation by the court of the prime function of the jury as the trier of the facts of the trial judge necessarily must be allowed wide discretion in granting or refusing a new trial.

"But where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigant's right to jury trial."

On the argument of this appeal, on questioning by the Court, counsel for the appellee admitted that he could not state that there was not sufficient evidence to support the verdict. Nor, does the defendant point to any other respect in which any "undesirable or pernicious element" occurred or was introduced

into the trial. There was no claim of evidence improperly admitted on behalf of the plaintiff, of any prejudicial statement by counsel, claim of improper charge to the jury or newly discovered evidence. The trial was in all respects regular.

What the rationale behind the trial judge's setting aside of the jury verdict, or even of the setting aside his own directed verdict for the wages themselves nowhere appears. While it is possible that the Court had something in mind, there is nothing in the record to justify the claim that what he did was not done for an improper reason. Under such circumstances, the mere determination itself becomes arbitrary. A determination without a rational basis for it is an arbitrary determination.

Furthermore, where it is possible that a determination may have been made for a good reason or for a poor one, and which of the two does not appear, the result may be overturned since the result could just as well have been for the wrong reason. *United N.Y. & N.J.S.H. Pilots Association v. Halecki*, 358 U.S. 613, 619. The holding of this case, therefore, in its reliance on *Portman, supra*, together with the holding of the *portman* case itself, are therefore, in direct conflict with the holding of the cases of the other circuits cited with respect to the reviewability of the decision of the district court to set aside a jury verdict. The holding that a district judge may set aside a jury verdict for unexpressed reasons, amounting to no more than the fact that he as trier of the fact would have held otherwise, amounts to a substitution of his verdict for that of the jury, and by such token a denial of the jury trial accorded by the Seventh Amendment of the Constitution.

The Second Trial

It is respectfully submitted that serious error was committed by both trial courts with respect to their handling of the provisions of Title 46 U.S.C.A., Section 642. 46 U.S.C.A. 642 provides:

> "Every Master shall, not less than 48 hours before paying off or discharging any seaman, deliver to him, or, if he is to be discharged before a coastguard official to whom the duties of Shipping Commissioner have been delegated, to such coastguard official a full or true account of his wages and of deductions to be made therefrom on any account whatsoever. No deduction from the wages of any seaman except in respect of some matter happening after such delivery shall be allowed unless it is included in the account delivered; . . .".

Clearly, both of the defendants' contentions with respect to which it was permitted to defend, that the plaintiff had not earned all the overtime hours shown by the Master and thus was not entitled to be paid $3,941.69 shown on the seaman's wage voucher, and the further contention with respect to the "assignment", both contentions permitted over the proper objection of plaintiff's counsel, related to matters occurring *after* the delivery of the wage account to the plaintiff. Both were therefore contrary to the provisions of the statute and were in effect impermissible or illegal defenses. While there have been no cases interpreting the provisions of Section 642 since the effective date of its enactment, or of the statute from which it was derived, which was the Act of June 7, 1872, Chapter 322, Section 23, the language of 642, it is plain that the Master having rendered his account to the seaman, the ship owner and

the Master are forbidden thereafter to make any deduction with respect to anything occurring prior to the rendition of the account for any reason whatsoever.

It is clear beyond argument and has been the subject of discussion in many cases that one of the all pervading purposes of the Seamen's Act, particularly as reflected in 46 U.S.C.A. 596, 597 and 642 was to prevent exactly what the appellee is now seeking to defend. That is, to withhold wages from a seaman on the basis of after-acquired reasons for doing so.

It is clear beyond argument and has been the subject of discussion in many cases that one of the all pervading purposes of the Seaman's Act, and particularly as reflected in 46 U.S.C.A. 596, 597 and 642, was to prevent exactly what the appellee is now seeking to defend; that is, to withhold wages from a seaman under pretext that there are "reasons" for doing so.

The entire statute was for the protection of notoriously helpless seamen to secure for them a prompt payment of the wages that is due to them. The appellee complains that the appellant has cited no cases under 642, but it is obvious that there have been no cases, so clear are the express terms of the statute, knowledge of which the appellee is chargeable with.

Further, according to the holding of *Isbrandtsen v. Johnson*, 343 U.S. 779, *Shilman v. United States*, 164 F.2d 649, cert. den'd. 333 U.S. 837 and Norris, The Law of Seamen (Third Edition) §§355, 356, 392 and 536, the deduction which the appellee would not withhold, is clearly forbidden since it is not one specifically listed in the deductions permissible by statute.

Thus, see *Mavromatis v. United Greek Shipowners Corporation*, 179 F.2d 310, 314.

> "As stated in Shilman v. United States, 2 Cir. 1947, 164 F.2d 649, 650, certiorari denied 1948, 333 U.S. 837, 68 S.Ct. 608, 92 L.Ed. 1122, under the provisions of the Seaman's Act a seaman is entitled to payment, at the termination of his employment, of all of his earned wages, without any deductions except those which are expressly authorized by statute."

At the first trial the failure of the court to charge the jury with respect to the contents of 642 caused the plaintiff no damage. He prevailed in any event.

The failure of the court to so charge at the second trial was clearly prejudicial to the plaintiff's presentation of his case. There was prejudice in the first place as bearing on the issue of whether or not the appellee should promptly have paid this money to the plaintiff. It was further prejudicial in permitting the jury to consider issues on which the appellee was permitted to defend, issues which were irrelevant, or in any event, that might have been considered differently with the statutory mandate before it. Obedience to the statute would have precluded either of the claims on which the defenses were based. In any event the jury would have been entitled to consider these defenses in the light of the specific words of the statute.

In this light it is respectfully submitted that it was incumbent on the trial court to direct a verdict for the plaintiff with respect to the stated $965.00 withheld. And in any event, if it was not correctly so minded, to have advised the jury of the contents of

the section. Both applications were made to the court, refused, and exception taken.

Should the verdicts of the first trial not be reinstated, the verdict of the jury denying liquidated damages should be set aside and the matter returned to the lower court for a new trial.

The entire purpose of rules relating to exclusion of evidence, framing of issues, and exclusion of irrelevant issues is to keep within rational bounds the matters that a jury consisting of laymen should properly consider. To have permitted the presentation of two entirely irrelevant defenses, and to also have prevented the plaintiff from making reference to the plain terms of the statute which made them irrelevant was just as much a denial of a proper jury trial, as to have refused the empanneling of the jury in the first place.

Reasons for Granting the Writ

It is respectfully submitted that this petition presents meritorious reasons of importance for the granting of this writ. They are

1. The Court of Appeals for the Second Circuit herein has made a decision in conflict with the decisions of other courts of appeals on the same matter with respect to the reviewability of the decision of a district court setting aside a jury verdict and granting a new trial,

2. The decision of the Court of Appeals for the Second Circuit herein has in effect denied the plaintiff the jury trial accorded him by the Seventh Amendment of the Constitution

(a) in affirming the order of the district judge setting aside the jury verdict at the First Trial,

(b) in affirming the verdict at the Second Trial wherein the jury was permitted and by the charge of the court in effect directed to consider matters forbidden by statute to be considered and irrelevant to the issues of this case, and

(c) the matters in question are common to the trial of most seamen cases, matters with respect to which this Court has always exercised the power of supervision and which in this case require the exercise of such power of supervision.

CONCLUSION

THE VERDICTS OF THE FIRST TRIAL SHOULD BE RE-INSTATED; ALTERNATIVELY, THE MATTER SHOULD BE REMITTED TO THE LOWER COURT FOR NEW TRIAL CONSISTENT WITH THE PROVISIONS OF 46 U.S.C. 642.

REGINALD LEWIS, Petitioner

By NATHAN BAKER
Counsel for Petitioner
1 Neward Street
Hoboken, New Jersey 07030

HERBERT LEBOVICI
Of Counsel

Dated: New York, New York
July 8, 1974

Order at First Trial Setting Aside Verdicts and Remanding Case for New Trial

The above entitled action having been duly brought to trial on the 20th day of January, 1972, before JUDGE DUDLEY B. BONSAL and a jury of six,

And the issues of fact having been duly submitted to the jury on the 24th day of January, 1972,

And pursuant to the instructions of the Court, the jury having returned the Special Verdict, a copy of which is annexed hereto and made a part of this order,

And the Court, on January 24, 1972, having withheld the entry of judgment on the verdict until the further order of the Court,

And the Defendant having moved by Notice of Motion dated the 2nd day of February, 1972, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure for an order setting aside the jury verdict on all the issues and entering judgment for the Defendant notwithstanding the verdict, or in the alternative for a new trial on all the issues submitted to the jury pursuant to Rule 59 (a-1) of the Federal Rules of Civil Procedure, or in the further alternative, for a new trial unless the Plaintiff agrees to a remittitur pursuant to Rule 59 (a-1) of the Federal Rules of Civil Procedure,

NOW, on reading and filing the said Notice of Motion dated the 2nd day of February, 1972, and the supporting affidavit of VICTOR S. CICHANOWICZ, duly sworn to the 2nd day of February, 1972, the affidavit of HERBERT LEBOVICI, in

opposition thereto, sworn to the 4th day of February, 1972, the reply affidavit of VICTOR S. CICHANOWICZ, sworn to the 7th day of February, 1972, and the said motion having come on to be heard before me on the 9th day of February, 1972, and after due deliberation having been had, it is

ORDERED that insofar as the application is made to alter, modify or set aside the jury verdict with respect to the Plaintiff's claim for damages for injury sustained as a result of the unseaworthiness of the vessel or negligence of the Defendant, or insofar as the Defendant's application is made to alter, modify or set aside the Special Verdict of the jury with respect to questions and answers therein numbered 1 through 7 inclusive, the said application of the Defendant is in all respects denied; and it is further

ORDERED, adjudged and decreed that the Plaintiff shall recover of the Defendant $20,400 pursuant to Items 1 through 7 of the Special Verdict with interest from the 24th day of January 1972; and it is further

ORDERED upon the agreement of both parties that the Plaintiff shall additionally recover of the Defendant $720.00 for maintenance; and it is further

ORDERED that with respect to the receiving by the plaintiff of $20,400.00 and $720.00 as aforesaid, it is expressly determined that there is no just reason for delay of the entry of judgment herein and the entry of such judgment is expressly directed; and it is further

ORDERED that the plaintiff shall have execution on the judgment so entered; and it is further

ORDERED that the issues stated in the Complaint in the first and second causes of action therein shall be, and they hereby are, severed from the other issues in the case; and it is further,

ORDERED that the ruling by the Court before the submission of the issues to the jury that it "would direct a verdict for $965." for plaintiff and that it "will so rule" be and the same hereby is withdrawn; and it is further

ORDERED that Item 8 of the Special Verdict of the jury herein, finding that the defendant unreasonably withheld plaintiff's wages be, and the same hereby is, set aside; and it is further

ORDERED that the claims of plaintiff relating to his right to recover $965.69 and the right of plaintiff to recover under the provisions of Title 46 U.S.C.A. §§596 and 597 and the same hereby are, remanded to the Calendar Part of this Court for new trial.

Dated: New York, New York
March 9, 1972

DUDLEY B. BONSAL
U.S.D.J.

JUDGMENT ENTERED 3/9/72

John Livingston
Clerk

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 711—September Term, 1973.
(Argued March 25, 1974 Decided April 15, 1974.)
Docket No. 73-2684

REGINALD LEWIS,

Plaintiff-Appellant,

v.

HUDSON WATERWAYS CORPORATION,

Defendant-Appellee.

Before:

KAUFMAN, *Chief Judge,*
SMITH and ANDERSON, *Circuit Judges.*

Appeal from that portion of a judgment entered on a jury verdict in the United States District Court for the Southern District of New York, thomas P. Griesa, *Judge,* denying the double-wage penalty for withholding of seaman's wages at discharge.

Affirmed.

HERBERT LEBOVICI, Esq., New York, N.Y. (Lebovici & Safir, New York, N.Y., on the brief), *for Plaintiff-Appellant.*

VICTOR S. CICHANOWICZ, Esq., New York, N.Y. (Cichanowicz & Callan, New York, N.Y., on the brief), *for Defendant-Appellee.*

PER CURIAM:

Reginald Lewis joined the SS Transorleans at Freeport, Bahamas on January 11, 1967, as an assistant engineer. Chief Engineer Lewis Molnar, a friend who had found the job for him, had told the ship's Master that Lewis possessed the requisite credentials to serve as a third engineer. After the ship left Freeport en route to Bombay, India, however, the Master discovered that Lewis had no such papers and had to sign him on as an uncertified utility engineer.

On March 7, Lewis injured his back while repairing the ship's boiler. Prior to the injury, he had stood watch and accumulated overtime, which were duly recorded in the ship's engineering log by his friend, Molnar. After the injury, he seldom worked, but Molnar apparently continued to record overtime for him. Lewis was discharged for medical attention at Balboa, Canal Zone, April 15. The Master had no cash available to pay him but offered him a voucher showing salary due of $3,965.69, and the total hours worked, including overtime, for presentation to the paymaster in New York. Lewis accepted the voucher and signed a release of all of his claims against the ship.

The Master testified that at discharge Lewis asked that his salary be paid over to Molnar and so endorsed the voucher. The Master further stated that he had instructed Lewis to implement this action by an assignment to Molnar. Sometime after Lewis left the ship, Molnar presented such an assignment to the Master and subsequently received the amount due. Lewis, however, claims he never made any assignment and that he always intended to receive personal payment in New York.

Two days after discharge, Lewis presented the voucher to the paymaster in New York City who refused to honor it pending instructions from the ship. On April 20, he informed Lewis that the ship had already paid Molnar. Lewis telephoned Molnar, who telegraphed $3,000 to him but retained $965.69 as a commission for having procured the job for him.

Lewis did not protest the ship's payment to the Chief Engineer until two months later when he instituted a suit claiming unpaid wages totaling $965.69 and a double-wage penalty under 46 U.S.C.A. §596 for every day that the ship "unreasonably" withheld his salary. During pre-trial discovery, the ship learned for the first time that Lewis, in fact, had been bedridden when the ship's records showed that he had been working overtime. Lewis, however, contends that he worked the total hours recorded, although he admits he did not work them at the times indicated.

The only issues below were whether the voucher accurately stated the wages due, and whether the ship acted reasonably by paying Lewis' wages to Molnar.

The trial court allowed the ship to introduce Lewis' admission that he had not worked at the actual times recorded and Lewis

appeals, claiming that this evidence was barred by 46 U.S.C.A. §642 which provides that "no deduction for the wages of any seaman" shall be allowable if not stated in the voucher presented at discharge. This provision is to be read in connection with the Seamen's Acts, 46 U.S.C.A. §§591, et seq., which look towards "payment to the seaman by his employer, at the termination of employment, of all his earned wages, without any deductions except those which are expressly authorized by statute." *Shilman v. United States*, 164 F.2d 649, 650-651 (2 Cir. 1947), *cert. den.* 333 U.S. 837 (1948).

To comply with the statutes the master must present the voucher to the seaman forty-eight hours prior to discharge in order to allow him to protest to the ship, the Coast Guard, or the United States consul if such wages are reduced for reasons not permitted by statute. 1 Norris, *The Law of Seamen* §536 (1970). If the master were to certify a voucher and then refuse to pay a seaman discharged in a distant port, he "easily could wipe out every cent of a seaman's earned wages." *Isbrandtsen Company, Inc. v. Johnson*, 343 U.S. 779, 788 (1952). After payment, the ship may bring an action for fraud against a seaman like Molnar or Lewis for reporting inaccurate hours, but ordinarily a court will not allow a ship to introduce evidence of hours actually worked to disprove the accuracy of its own voucher in a suit for wages.

The trial judge's error in admitting this evidence, however, did not prejudice Lewis because the jury necessarily found the voucher correct when it awarded the salary balance of $965.69. Lewis' contention that the evidence of the false overtime caused the jury to deny him the double-wage penalty is unpersuasive. The withholding at discharge was caused by the purported assignment, not by the overtime inaccuracies which only became

apparent at the commencement of trial; and although the jury in special verdicts found the assignment invalid, it also specifically found that the ship had not acted unreasonably in paying Molnar the sum due Lewis. Moreover, the ship's claim that it had a basis for withholding any further payments when it learned of the overtime inconsistencies was rejected by the jury when it found the voucher valid.

The penalty, now approximately $90,000, is only to be imposed for " 'arbitrary and unscrupulous action,' " *McCrea v. United States*, 294 U.S. 23, 30 (1935), and ". . . [t]here is neither justice nor policy in aiding [this plaintiff] to catch at penalties, when [he] has suffered no wrongs." *Petterson v. United States*, 274 F. 1000 (S.D.N.Y. 1921) (L. Hand, J.).

The judgment of the district court is affirmed.

Special Jury Verdict on First Trial

(Same Title)

1. Was the *SS TRANSORLEANS* unseaworthy with respect to Plaintiff's alleged accident on March 7, 1967? A. Yes.

2. Was the Defendant Hudson Waterways Corporation or any of its employees negligent with respect to the alleged accident? A. Yes.

If your answers to questions 1 and 2 are "No", your verdict must be for the Defendant. If your answer to either question 1 or 2 is "Yes", answer question 3.

3. Was such unseaworthiness or negligence a proximate cause of the accident sustained by the Plaintiff? If your answer is "No", your verdict must be for the Defendant. A. Yes.

4. If your answer to question 3 is "Yes", what was the total amount of damage suffered by Plaintiff by reason of the accident? A. !25,500.

5. Was the Plaintiff *Reginald Lewis* negligent, which contributed to his accident? A. Yes.

6. If your answer to question 5 is "Yes", to what extent did Plaintiff's negligence (contributory negligence) contribute to the accident? (State in Terms of percentage.) A. 20%.

7. If your answer to question 5 was "Yes", apply the percentage stated in answer to question 6 to the amount of damages

stated in answer to question 4, and subtract this amount from the damages stated in answer to question 4, and the result will be your verdict for the Plaintiff. A. $20,400.

8. Did Defendant unreasonably withhold Plaintiff's wages? A. Yes.

Mrs. Violet Walsh
Foremar

Court's Exhibit
U.S. Dist. Court
S.D. of N.Y.
Jan 24, 1973
1 id

Seaman's Pay Voucher (In Evidence)

[illegible] CARGAS CORPORATION a/s "TRANSORIGANS" Voyage No. 17

[illegible] YORK Port BALBOA, C.Z. Date APRIL 15-

Name REGINALD G. [illegible] Rating 3RD ASST ENGINEER Soc. Sec. No. 092-42-455

770 EAST 22/ ST. BROOK.65 N.Y.

Citizen ☐ Resident Alien ☐ Non Resident Alien ☒

Credits:

Wages: Earned ☐ Vacation ☐ Other ☐

From 1-11-57 To 4-15-57 3 Mos. 5 Days [illegible] Hrs. @ 662.01 Per Mo. $ 2.096.

From [illegible] To [illegible] Mos. [illegible] Days [illegible] Hrs. @ [illegible] Per [illegible]

From [illegible] To [illegible] Mos. [illegible] Days [illegible] Hrs. @ [illegible] Per [illegible]

Bonuses:

From [illegible] To [illegible] Mos. [illegible] Days [illegible] Hrs. @ [illegible] Per [illegible]

From [illegible] To [illegible] Mos. [illegible] Days [illegible] Hrs. @ [illegible] Per [illegible]

From [illegible] To [illegible] Mos. [illegible] Days [illegible] Hrs. @ [illegible] Per [illegible]

Overtime: (Attach Supporting Overtime Sheet) 7/8 Hours @ 4.23 Per Hour 3.375

[illegible] Hours @ [illegible] Per Hour [illegible]

Extras: [illegible]

5

Total Earnings ..... $ 5.471.

Deductions:

Remarks

FOR OFFICE USE ONLY

Set Up For Taxes

P/R #

By

Credit to Master's Account

No.

By

Social Security Tax Computation:

Total Earnings as Above 5.471.91

Board & Lodging 95 Days

@ 1.60 Per Day 149.00

Total Taxable @ 4.4% 5.620.91

Deductible Social Security Tax 247.32

Withholding Tax ☐ Days—Exemptions ☐ N.R.A.

Tax Total Earnings as Above

Non Resident Alien Tax Computation:

Total Earnings U. S. Waters ....

Less Exemption Days

@ $1.70 Per Day ....

Taxable Amount at 30% ....

Deductible Alien Tax ....

Allotments ....

Slop Chest 85.90

Advances 1173.00

Fines .....

Others .....

PLAINTIFF Exhibit 2

Total Deductions ..... $ 1.506.

Sub Balance ..... $ 3.965.

Maintenance Allowance Ashore:

Meals: From [illegible] To [illegible] @ [illegible] Per Day ....

Room: From [illegible] To [illegible] @ [illegible] Per Day ....

Transportation: From [illegible] (Port) To [illegible] (Port) ....

Net Amount Due ..... $ 3.965.

I certify that this voucher is true and correct that the person named hereon was employed and has performed the services for the period as stated above; and that he is entitled to the amount of pay as noted on this voucher.

[illegible]
Master

Pd. at Port of [illegible]

By [illegible] (Please Fill in Payees Name)

Master ☐ Agent ☐

Received the above in Full Payment for Service to Date:

R. Reginald
Seaman's Signature

Paid in Full Before Me:

U. S. Shipping Commissioner—Consul—Authorized Agent

FORM P-4

Mutual Release (In Evidence)

...PANAMA CANAL
...

MUTUAL RELEASE
TRANS ORLEANS

We, the undersigned, seaman on board the TRANS ORLEANS 242223 on her late voyage from SAN PEDRO to GALVESTON do hereby, each one for himself, by our signatures herewith given, in consideration of settlements made before the Shipping Commissioner at this port, release the master and owners of said vessel from all claims for wages in respect of the said past voyage or engagement, and I, master of said vessel, do also release each of the seamen signing said release from all claims, in consideration of this release signed by them.

Dated... APRIL 15TH 1967 ... ...

ATTEST as to said master and the seamen whose signatures appear below.

Reginald G Lewis	UTY ENG.	4-11-1967	4-15-1967	4.85 8.67	1506.22 5471.91	965.59

WAGES TO BE RECEIVED IN NEW YORK
REGINALD G. LEWIS

NO WAGES AT THIS OFFICE

CERTIFIED TO BE AN AUTHENTIC XEROX COPY OF DISCHARGE EXECUTED IN THIS OFFICE ON APRIL 15, 1967, COVERING REGINALD G. LEWIS, CREWMEMBER OF THE TRANS ORLEANS.

WILLIAM W... HAYLE
DEP. SHIPPING COMM.-IN-CHARGE
BALBOA, CANAL ZONE
MAY 1[illegible] 1967

DATE 1/31/67
WITNESS